

Director, EED

Subject Core

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National Park Service granting right of use and occupancy on property under their land acquisition program. B-125035-O.M.

Members of your staff have requested our opinion concerning the legal nature of the right of use and occupancy retained by grantors under the land acquisition program of the National Park Service, (NPS), and concerning whether the Government is receiving a fair rate of return on its investment in these properties.

16 U.S.C. § 1 provides in pertinent part:

"There is created in the Department of the Interior a service to be called the National Park Service which shall be under the charge of a director. The Secretary of the Interior shall appoint the director, and there shall also be in said service such subordinate officers, clerks, and employees as may be appropriated for by Congress. The service thus established shall promote and regulate the use of the Federal areas known as national parks, monuments, and reservations hereinafter specified, except such as are under the jurisdiction of the Secretary of the Army, as provided by law, by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."

The above provision provides the Secretary of the Interior wide discretion in the administration of parks, monuments and reservations within the jurisdiction of NPS.

Since the 1930's NPS, in the course of acquiring land within the boundaries of national parks, has followed the policy of permitting owners of improved single-family residential property of exercising the option of retaining the right of use and occupancy, usually for 25 years or the life of the owner and spouse. Retention of the right of use and occupancy is authorized

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by several Acts of Congress in the newer areas of the National Park System. In areas where no statutory right exists, similar rights have been administratively allowed. The National Park Service is of the opinion that this policy has greatly facilitated its land acquisition program.

Since 1967 the National Park Service has administratively set the price of these reserved rights for noncommercial (single family) residential use and occupancy at 1 percent of the purchase price per year of retention, deducted from the purchase price. The NPS policy of deducting 1 percent per year of retention of the right of use and occupancy is not applicable to commercial, industrial, agricultural or similar income producing property. The grantors are responsible for utilities, maintenance, insurance, upkeep of the premises and subject to the restriction that said premises be used only for residential purposes. Moreover, the grantors are liable for any property taxes levied on their retained estate.

With respect to the question concerning the legal nature of the right of use and occupancy, that right arises from the deed of sale in which the grantor conveys to the Government a fee simple in the real property, retaining a life estate or an estate for a term of years (usually 20 or 25 years). Consequently, the Government obtains a fee simple subject to a life estate or a term of years. The retained right of use and occupancy is a legal interest in real property reserved by the grantor when his property is conveyed to the Government. The occupant is not a lessee, but rather the owner of an estate in real property of specified duration, and subject to the limitations specified in the deed creating the reservation.

The next question raised is whether the fee charged by NPS for use and occupancy represents a fair rate of return on the Government's investment. A related issue is whether the method of valuation is consistent with generally accepted practices. The concern pertaining to an equitable rate of return on the Government's funds derives from the fact that the fee has remained the same since 1967 despite the significant change in economic conditions. Moreover, preliminary investigation has indicated that many of the owners who have retained use and occupancy in Yosemite National Park are renting their residences for \$35-40 daily.

NPS believes that the arrangement for acquisition of inholdings has proven to be of a considerable advantage both to the property owner and the Government. The property owner is not disrupted by the land acquisition program and the Government, through the NPS, is enabled to acquire property without having to undertake costly condemnation proceedings. See Pub. L. No. 91-646, The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.

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NPS has provided in Policy Memorandum MC-65 (Revised), February 1, 1974, in part as follows:

"* * * Length of a life estate should be calculated by use of the actuary table published by the Department of Health, Education, and Welfare * * *.

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"It has been administratively determined for convenience of calculation that a 1.00 percent [formula] will be used. Thus, if the term of retained use is 25 years, 25 percent of estimated market value should be withheld from payment to the landowner for title to the estate purchased in his property.

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"* * * The 1.00 percent formula does not apply where minor restrictions or no restrictions are imposed on the retained use and it continues unimproved as before acquisition * * *." (Emphasis in original.)

Since the retention of the right of use and occupancy is provided for in a number of Acts, it is useful to examine specific statutes in order to determine how the Congress has by legislation dealt with the problem of the acquisition of inholdings in the national parks.

The statute establishing the Redwood National Park (16 U.S.C. § 79a ✓
et seq. (1970) provides as follows:

"The Secretary is authorized to acquire lands and interests in land within the boundaries of the Redwood National Park and, in addition thereto, not more than ten acres outside of those boundaries for an administrative site or sites. Such acquisition may be by donation, purchase with appropriated or donated funds, exchange, or otherwise, but lands and interests in land owned by the State of California may be acquired only by donation." 16 U.S.C. § 79c(a). ✓

Section 79d(a) ✓ of title 16 provides the owner of improved property acquired in order to establish Redwood National Park the option of a right of use and occupancy for noncommercial residential purposes either for a definite term of not more than 25 years or for a term ending at the death of the owner or his spouse, whichever is later. Under these circumstances,

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the Secretary is to pay the grantor the fair market value of the property on the date of acquisition minus the fair market value of the retained right. This section also provides that the right of use and occupancy is subject to termination by the Secretary upon the Secretary's determination that it is being exercised in a manner inconsistent with the purposes of the Act, and upon tender to the owner of the fair market value of the unexpired term. See S. Rep. No. 641, 90th Cong., 1st Sess. 25 (1967).

The term "improved property" is defined by section 79d(b) in the following manner:

"* * * a detached, noncommercial residential dwelling, the construction of which was begun before October 9, 1967, together with so much of the land on which the dwelling is situated, the said land being in the same ownership as the dwelling, as the Secretary shall designate to be reasonably necessary for the enjoyment of the dwelling for the sole purpose of noncommercial residential use, together with any structures accessory to the dwelling which are situated on the land so designated."

The above definition of improved property as a residential dwelling, the construction of which was begun before October 9, 1967, suggests that the peculiar circumstances of each individual park may fully support and account for tailored and divergent statutory treatment.

The statute creating the Cape Cod National Seashore (16 U.S.C. § 459b at seq.) authorizes retention by grantors of the right of use and occupancy on improved noncommercial property for a term of 25 years or life, and also provides the Secretary with the authority to terminate the right when in his judgment, any use occurs which "* * * is in any manner opposed to or inconsistent with * * *" zoning regulations adopted in accordance with standards set by the Secretary. Section 459b-3(a)(6) provides that a right of use and occupancy shall run with the land and may be freely transferred and assigned. The Senate Report on this bill stated in pertinent part: "* * * By this provision the right of owners to rent out their homes for the summer is assured * * *." S. Rep. No. 428, 87th Cong., 1st Sess. 25 (1961).

Section 459b-3(d) defines improved property as, "* * * a detached one-family dwelling the construction of which was begun before September 1, 1959 * * *." The Senate Report which accompanied the bill, stated in part:

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"It is the intention of the bill that a private home which is rented from time to time, or for the summer seasons but on a private, rather than a publicly commercial basis, shall be considered as 'improved property' as defined in this subsection." S. Rep. No. 428, supra, at 26.

Section 459b-3(a)(7) states that where a right of use and occupancy is retained, " * * * the compensation paid by the Secretary for the property shall not exceed the fair market value of the property on the date of its acquisition by the Secretary, less the fair market value on such date of the said right retained."

As the above indicates, congressional intent with respect to at least two recently created national parks has been that the owner of a retained right of use and occupancy should be paid no more than the fair market value of the property on the date of its acquisition less the fair market value of the right retained, and that when that right interferes with the purpose of the Act, the Secretary may terminate it. There is, however, no definition of "fair market value." Even under the statutes, it remains in the discretion of NPS to determine what is fair market value.

Whether the Government is receiving a fair rate of return is not a question of law. What constitutes a fair rate must be decided based on all the surrounding facts and circumstances. It may be that a rate would be so disproportionate to the Government's investment as to constitute, in effect, an unlawful waste or disposal of Government property, but on the evidence now before us we find no basis to conclude that the 1 percent rate used by NPS is so unfavorable to the Government as to constitute such an abuse of discretion by that agency. You are, of course, free to recommend as a result of your audit investigations, that NPS could drive a harder bargain and thus achieve a more favorable rate of return.

By the same token, we cannot decide, as a matter of law, whether the method of valuation is consistent with generally accepted practices nor can we establish what practices are generally accepted. Moreover, we are not aware of any legal requirement that it be consistent with generally accepted practices. From a legal standpoint, NPS may use whatever method of valuation it chooses, in the absence of any requirement of law to the contrary, so long as the method is not so arbitrary or unreasonable as to result in an unwarranted dissipation of Government property.

In this connection, it must be kept in mind that the purpose of the grant of use and occupancy is the equitable treatment of homeowners as well as facilitating acquisition by NPS of the inholdings. These purposes are not necessarily consistent with achievement by the Government of the maximum rate of return on its investment. GAO cannot criticize NPS for failing to achieve the maximum rate of return in the Opportunity Purchase program if the objectives of the program are being achieved even though the result is inconsistent with maximization of rate of return.

The fair market value of the inholdings and of the right of use and occupancy cannot necessarily be compared directly to the fair market value of the same property on the open market. The owner's only alternative to selling his property to NPS may be to have it condemned. The owner cannot sell it on the open market since potential buyers would be aware of the possibility of condemnation. Similarly, it is difficult to evaluate the right of use and occupancy in terms of a market, when as a practical matter NPS will grant such a right only to the owner of the property at the time of its acquisition by NPS. In such circumstances, NPS has great administrative latitude in determining what constitutes fair market value.

NPS contends, in this connection, that if it were to charge substantially more for the right of use and occupancy, owners of property might very well refuse to sell at all, forcing NPS to resort to condemnation proceedings which might ultimately be more expensive to the Government. This suggests that the fair market value of the retained right of use and occupancy is linked closely to the fair market value of the estate purchased by NPS. That is, it may not be realistic to compare the value of the retained right of use and occupancy with the value of a right of use and occupancy as determined between a buyer and seller with no other dealings. NPS makes this point, obliquely, in pointing out that a right of use and occupancy for 20 years on a \$35,000 property would be worth \$7,000 using the one percent formula, whereas it would be worth \$27,490, if computed based on the potential net yearly rental value of the right. NPS notes that it is unlikely that the homeowner would sell his property willingly if the retained right were computed in the latter manner. The point is that, looking at the transactions realistically, the relatively low cost of the retained right is part of the consideration for the property owner to enter willingly into the transaction at all. In that sense, it does not seem unreasonable for NPS to argue that the cost of the retained right does represent fair market value. We note in this connection that NPS, in its August 1974 memorandum on its policies on the retained right, asserts that the legislative committees of both Houses which deal with the national parks, are aware of and approve the NPS policy.

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Yosemite Park
Acquisition

Medical Park Service

Use and occupancy

Yosemite National Park
Acquisition
Use and occupancy

The grants of the right of use and occupancy incorporate an agreement that the owner will use the retained right for "noncommercial single-family residential purposes only, including the right to rent or lease the property as a single family residence * * *." Apparently inholders at Yosemite are renting their homes through a local rental pool. NPS takes the position, according to your staff, that this is not a commercial use in violation of that covenant.

We cannot say, as a matter of law, that the rentals in Yosemite violate the covenant. This would depend, at least in part, on the intent of the parties, and the parties (NPS and the property owners) may well have contemplated what may have been the continuation of an existing practice of renting the properties for residential use. Arguably, the rentals do not cross the line from "residential" to "commercial" use, as those terms are used in the covenants.

As pointed out above, the right of the owners to rent their property for substantial use under a right of use and occupancy is, in the case of the Cape Cod National Seashore, sanctioned by statute, yet that statute allows the right of use and occupancy only for "noncommercial" property. It does not appear in the record whether NPS was aware of and took into account, when negotiating the purchases and grants of the right of use and occupancy, the practice of rentals at Yosemite. The Cape Cod statute suggests that the Congress would favor allowing holders of a right of use and occupancy to rent out their properties, and that it does not consider rentals necessarily to be a "commercial" use.

You may conclude that NPS should, if it is not doing so, take into account the income-producing use of a property when computing fair market value for purposes of negotiating an opportunity purchase with retained right of use and occupancy. But without further information concerning prior practices and the intent of the parties, it appears that, as in the Cape Cod situation, the restriction to noncommercial use of the retained right does not necessarily prevent rentals of such property to be considered consistent with residential use.